

## **A Task Force to Study Employee Misclassification**

**(SB 500 Ch. 378:7, Laws of 2008)**

### **Minutes of the August 10, 2010 Meeting**

#### Members Present:

Deb Stone	NHID
Paul Morin	HBRANH
Ron Ciotti	Non-residential construction
Lon Siel	NHES
Gary Wright	NHES
Marie Vailanson	NHES
Fred Kfoury	Central Paper
John Lighthall	NHDRA
John Jackson	C Local 118
Cathy Bernhard	NHDOJ
Ellery Hathorn	DOL
Jeff Goley	NH House of Representatives

(Guests: Jim Young (NHID) to take minutes)

#### *Agenda*

- (1) Acceptance of minutes from 07/2010 meeting*
- (2) Update on website enhancements*
- (3) Reports from DOL/Stone meeting with Governor's office*
- (4) Continued discussion of recommendations*
- (5) Date for next meeting (at which we will vote on recommendations)*
- (6) Other Business*

1. Called to order at 1:30pm. *Morin* moved, *Hathorn* seconded to approve July minutes as amended to include John Lighthall who was in attendance but missed on the list of attendees. Unanimous vote in favor. *Holden* (clerk) not in attendance so no other minutes to approve.
2. *Stone* advised that there has been one more change to the misclassification website on the 'Contact Us' page. Since she is no longer with NHID, contact info has changed to her personal e-mail address and Ellery Hathorn has been added as a representative of the DOL. *Stone* said that it would be a week or two before the website would go live as it is going through testing at DOIT. A press release will be issued once the enhanced site is live. Also, since Task Force wraps up by December 1, 2010, *Stone* recommends that ownership of the content of the website be transferred to the new Enforcement Task Force (See item (3) below.)
3. DOL Commissioner Copadis, *Stone* & *Hathorn* met with Liz Gray of the Governor's office. The meeting included a review of possible recommendations from the Task Force as well as a discussion of the possibilities of a new Task Force set up by executive order. The Governor is open to this and *Stone* & Copadis will be developing a draft of an executive order to be forwarded to Liz Gray. The five agencies currently on this Task Force will be included as well as several other state agencies, and there is consideration being given to including an advisory arm to the new Task Force. This advisory arm would not be involved in the actual enforcement but would add a public perspective and act to continue the work of this existing Task Force. There are no names for positions as yet; the enforcement arm would be Commissioners or their designees and the public/advisory arm would be appointments by the Governor's office.

4. The Stop-Work Order (SWO) sub-committee gave a report. Morin told the group that the three members of the sub-committee met again after the July Task Force meeting, and included Marty Jenkins (DOL legal counsel). The group agreed that they realize that SWOs can have an adverse effect not only on the violators but also other businesses or individuals involved in a project that are acting legally. The focus of any NH SWO authority should focus on 'bad actors' and should be limited to egregious/repeat offenders. Like other states, issuance of an SWO doesn't necessarily mean that work stops immediately. Instead, the SWO acts as a notice to employers to get WC and to let employers know the consequences of choices. The recommendation for SWO authority for DOL would include a time period to fix the violation leading to the SWO, and only if the employer does not comply would the SWO become effective and require work stoppage. There would be an appeals process after the issuance. Also, the majority of the sub-committee felt that no SWO should be issued if there is WC on the site even if individual sub-contractors did not have WC. Donahue disagreed with this and believes all sub-contractors should also be required to carry WC.

Hathorn stated that Ray Marchand (MA DOL) said that in MA everyone who receives an SWO automatically appeals it in order to stay the SWO pending a hearing. MA schedules hearings within 14 days of the appeal and usually the employer has obtained coverage prior to the actual hearing. Fines are \$100/day for the first offense and \$250/day for subsequent offenses. MA issues SWOs to sub-contractors on site without coverage even if the GC has coverage. Very few job sites actually get shut down in MA. Stone asked Hathorn to clarify when MA actually imposes debarment; Hathorn stated that the employer is debarred after an unsuccessful appeal.

The question was asked whether the SWO should apply only to one location where the employer is operating or all locations in NH. The majority of the group indicated that it should only apply in the single location, because different job conditions could be in place. However, a violation in one location should trigger increased scrutiny by DOL of the other locations where the employer may be working. There was some discussion of fines; the sub-committee suggested that significant fines should be implemented in order to make the issuance of an SWO more than just 'the cost of doing business.' In later discussion the Task Force actually decided that fines should not be imposed simply because an SWO was issued; if the appeal is successful (no actual violation) why should that cost the employer money? Also, the existing statutes allow the DOL to impose fines already for violators.

Ciotti raised a concern as to how 'repeat offender' would be defined. How long between violations? What about the effect of changes in laws or regulations? He also expressed once again his on-going concerns about the fact that the twelve criteria are not absolute and how this would affect the situations with repeat offenders and any damages that might accrue while potential violations are making their way through various levels of appeal/hearings/litigation. In later discussion during the meeting the Task Force agreed to look at a rolling window of three years from the time of the first violation as a reasonable time-frame to define repeat offender. (Bernhard did ask why we would want to limit the time frame; Stone advised there could be multiple reasons including a change in company management or operations and it isn't necessarily equitable to continue to make the current business/employer liable for violations years ago.)

Goley asked for clarification about the appeals process beyond the initial appeal. Hathorn explained that after the initial hearing there is an Appeals Board at DOL and after that it could go to Superior Court or the Supreme Court. Hathorn stated that the DOL would not be likely to issue an SWO if there is any doubt about its basis, and that it is likely that any SWO would have to have approval of the Commissioner and the Deputy Commissioner. Ciotti expressed concern that any recommendation for legislation be stated in such a way that the level of enforcement from DOL be clear and consistent. Goley advised that he hopes that the DOL would have a process in place to review the other operation of offending contractors to make sure they are in compliance everywhere.

The final portion of the discussion of SWOs involved whether repeat offender can include individuals as well as businesses (e.g. principals of a business) or can include a business that has re-formed under a new name. Ciotti's opinion was that we need to limit it to the existing business with the violation. Siel stated that in certain situations (by statute for NHES) both the corporation and certain individuals can be held accountable. Jackson stated that it not uncommon for the principals of construction companies to own several businesses with different names, and if they run into problems with one they just shift to another. RSA 281-A does not currently allow enforcement against a different business name even if the same people are involved. Goley stated that he believes we should be looking at this as these employers should not be allowed to bypass the law by engaging in this practice. Stone asked that Hathorn & Siel look at whether there is language in statute that could be adapted to RSA 281-A. She will put a discussion on the September agenda, but this may need to be passed off to the next Task Force if there doesn't end up being enough time to address it adequately.

Stone will draft possible language for two motions regarding SWOs to be voted on at the September meeting, one including the ability to count repeat offenders using the same principals operating under different names and one without that piece.

5. Stone asked to revisit the independent contractor registration process discussion. There are two proposals on the table at this time; one proposal is a non-binding registration utilizing the twelve criteria and the other proposal is for a binding registration process (that may use the twelve criteria but is not really bound by them once somebody successfully registers as an independent contractor.) Stone asked if we want to bring both proposals to a vote or decide on one right now. In either case, the final report can include a majority view and a minority view. Hathorn asked if the binding registration would have an effect on WC rates; Stone answered that it would probably reduce rates slightly over time, but that the overall systemic costs may not be less. Treatment for injuries has to be paid for somewhere, and it will be especially necessary to have a fiscal note accompanying any bill that proposes a binding registration.

Ciotti stated that it is hard to say whether someone is in favor of registration process unless we know whether the proposal is binding or not. Morin suggested having a straw vote; Stone asked for responses from attending members on whether they favor a binding or non-binding registration. Three voted binding (Morin, Ciotti, Lighthall), two favored non-binding (Goley, Jackson) and several abstained (Siel, Hathorn, Bernhard, Stone, perhaps as a result of having to check with their agencies/commissioners.) Kfoury had stepped out of the room during vote, but had already stated that he has problems with registration process when the state is not adequately enforcing existing laws about who is allowed to work to begin with. As a result of the fact that neither proposal seems to have a majority in favor at this time Stone will draft two different proposals and we will have two votes. A question was raised as to what happens if neither passes with a majority; Stone stated that in that case registration process will not be in final recommendations but we will still be able to show the information in our final report and thus it will be available for others to act on if they choose.

6. Next meeting tentatively set for the afternoon of September 30<sup>th</sup>.
7. Morin moved to adjourn at 2:57pm, seconded by Hathorn. Meeting adjourned without objection.

Respectfully submitted,

Deb Stone, Chair